IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

COMPANY PETITION NO.559 OF 2004

Oriental Bank of Commerce .... Petitioners
vs.
Deccan Florabase Ltd .... Respondents

J. Mitra i/b. Wadia Ghandy and Co. for the petitioner.
Janak Dwarkadaswith Manish Pandya i/b. S.K. Chaturvedi for the company.

CORAM: S.U. KAMDAR, J.

DATE : 24TH MARCH, 2005.

P.C. :

1. The present petition has been filed for winding up of the respondent company on the ground of just and equitable. The petitioner is admittedly a preference share holder. Para-7 of the petition makes it clear that the petitioner subscribed to the 14% redeemable cumulative preference shares issued in its favour by the respondent company on various terms and conditions including redemption

thereof. The present petition is filed by the petitioner under section 434 (e) for winding up of the company on the ground of just and equitable. It is the case of the petitioner that the company is liable to repay the amount of the preference shares a they are already due for redemption. A statutory notice was sent demanding the aforesaid payment.

2. It is the case of the petitioner that the present petition is not filed under section 433 of the companies Act on the ground of unable to pay its debt but is filed under section 433(e) on the ground of just and equitable and and it is thus contended that the present petition even by a preferential shareholder is maintained. It is his case that under section 439 various persons including creditors and or prospective or contingent creditors are also entitled to file a petition. It is the case of the petitioner that they are creditors within the meaning as defined under section 439(b) of the Act. However, the

learned counsel for the company has drawn my attention to the judgment of the learned single judge in Company Petition no. 336 of 2002 in which it has been inter-alia held that the preference shareholder is not in a position of a creditor and thus the winding up petition by such a preference shareholder is not maintainable. The judgment of the learned single judge was carried in Appeal and the division bench has in its order and judgment dated 5.8.2004 held in para-3 as under :

"3. The legal position seems to be fairly settled that the preference share holder is a shareholder only and cannot be said to be holding the position of a creditor. The Andhra Pradesh High Court speaking through BP Jeevan Reddy, J (as his Lordship then was) in Lalchand Surana and Ors. vs. Hyderabad Vanaspathy Ltd, held that the holder of redeemable preference shares does not become a creditor and a petition for winding up by the holder of redeemable preference shares is not maintainable."

3. In view of the judgment cited by the respondent company I am of the opinion that the aforesaid argument advanced by the learned counsel for the petitioner cannot be accepted because once he is

not a creditor under section 439(1)(b) of the said Act, the question of he being a prospective or contingent creditor does not arise merely because at some point of time the shares are liable to be reduced. In light of the aforesaid position the present petition is not maintainable and the same is dismissed accordingly.

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